sented was determined by the Court in the exercise of its jurisdiction *in rem* over a vessel within its possessions and depended upon the application of the statute and Treaty. If this be true, then indisputably the question under the Treaty was properly raised as a defense in the answer and exceptions.

But if the question arising under the Treaty did go to the jurisdiction of the Court, it must have related either to its jurisdiction over the parties or over the subject-matter. It has frequently been said that objections to the jurisdiction of a Court over the parties may be waived (*Ford* v. *United States*, 273 U. S. 593, 606), but that questions relating to the jurisdiction of courts over the subject-matter may be raised at any time, since such jurisdiction cannot be conferred by consent of the parties. *Gainesville* v. *Brown-Crummer Co.*, 277 U. S. 54, 59; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 13, 18; *Mansfield R. Co.* v. *Swan*, 111 U. S. 379, 382-384.

This being a proceeding *in rem*, this question relating to the construction of the Treaty, if treated as going to the jurisdiction of the Court, cannot be regarded as an objection to the jurisdiction over the parties. The Court had jurisdiction over the vessel, and at the very least had jurisdiction to determine its own jurisdiction. Therefore, if the question goes to the jurisdiction of the Court at all, it is to its jurisdiction over the subject-matter—an objection which can not be waived and may be raised at any time. Moreover, it is arguable that, since an appeal in admiralty is a trial *de novo*, the question under the Treaty—whatever its nature—might have been raised for the first time in Circuit Court of Appeals; *and it is not denied that in that Court the issue under the Treaty was regarded as the controlling point in the case.*

Nor is this case to be confused with those which hold that a seizure of a domestic vessel in foreign waters is at most a trespass which does not raise any question militating against the jurisdiction of the proper Federal Court on a subsequent valid seizure of the vessel by civil authorities. *The Richmond,* 9 Cranch. 102; *The Merino,* 9 Wheat. 391, 402. Here the question relates to the lawfulness of the imposition of penalties upon a *foreign* vessel under the Tariff Act, and turns upon whether seizure of the vessel at a particular locality upon the high seas was a violation of our Treaty with Great Britain.

But whatever be the character of the question raised under the Treaty—whether it be regarded as going to the jurisdiction of the Court or not—we contend that on the record it was raised in a manner which is timely and proper under the *admiralty* practice. We submit that such of the cases cited by the Government as are in point support our view, and that from the following review of all the cases cited by the Government it will be found that the "serious doubts" of the Government are engendered by the assumption—*not founded upon authority*—that the strict common law rule relating to the order of pleadings, whereby pleas in abatement must precede pleas to the merits and are waived when the latter are filed, is applicable to proceedings *in rem* in admiralty.

Shepard v. *Graves,* 14 How. 504, 510, cited by the Government, is an example of the application of the strict rule of pleading. But that case was at common law. It has no place in admiralty where, as recognized in another case cited by the Government (*The Merino,* 9 Wheat. 391, 402), the technical niceties of the common law are not regarded. It is true that in *The Merino, supra,* an objection of claimants of ves-

sels in proceedings in admiralty *in rem*, to the effect that process had not been issued, was held to be without merit. But even if this ruling be regarded as proceeding upon the ground that the right to process was waived by the filing of appearances and asserting of claims, rather than upon the more valid ground that no process in the usual sense is required in proceeding *in rem*, the case is not here in point, for petitioner does not demand the service of process and makes no objection to the jurisdiction of the Court to determine the issue but to the validity of the imposition of the penalties and the authority of the administrative officers to have made the seizures.

The Richmond, 9 Cranch. 102, merely holds that the seizure of an American vessel by the Federal forces within the territorial jurisdiction of another power is at most a trespass against that other power which does not militate against the jurisdiction of the proper U. S. District Court on a valid subsequent seizure of the vessel by civil authorities. As already stated, no such question is presented here. The question here is whether the vessel can be subjected to penalties under the Tariff Act since it is a foreign vessel seized outside of territorial waters and at a place not within the zone laid down by our Treaty with Great Britain. In so far as *The Merino, supra* (9 Wheat. 391-402), involved the same point as *The Richmond* (9 Cranch. 102), it is distinguishable upon the same grounds.

In re Johnson, 167 U. S. 120, 126, involved a question of jurisdiction over the person under the criminal statutes peculiar to the Indian Territory. It applied the same theory in a different field, which was applied in *The Richmond, supra*. It did not involve, nor discuss, the point of pleading which the Government makes in this case.

Dodge v. *United States*, 272 U. S. 530, held that the seizure of a motor boat by a person not authorized by law, could be adopted by the United States and thereupon forfeiture proceeding would be had. The case discussed no question of pleading and is not in point here. The objection here is not merely to the status of the person who seized the vessel, but relates to a claimed immunity from seizure at all, at the locality and under the circumstances.

In *Ford* v. *United States*, 273 U. S. 593, 606, persons were tried for conspiracy to violate the National Prohibition Act and the Tariff Act. The trial and conviction resulted largely from the seizure of a British vessel. There was conflicting evidence as to whether the place of the seizure was within the zone of the high seas prescribed by our Treaty of 1924 with Great Britain. On the question of the admission in evidence of the ship and her cargo the District Court determined without the aid of the jury that the place of the seizure was within such zone and, therefore, the seizure was lawful. It was contended in this Court that the issue as to the place of the seizure should have been submitted to the jury upon the general issue. This Court said:

> "The issue whether the ship was seized within the prescribed limit did not affect the question of the defendants' guilt or innocence. It only affected the right of the court to hold their persons for trial. It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants."

The case is merely another illustration of the rule that jurisdiction of the Court over the parties may be obtained by consent and that objections to the exercise of such jurisdiction may be waived. The case was not in admiralty and contains no rule, express or implied, on the question whether the objections raised as a defense in this case were proper matters to be raised in answer and exceptions or not.

The Underwriter, 13 F. (2d) 433, 434 (C. C. A. 2d), is an authority for, rather than against, our view. There the seizure was of an American vessel upon the high seas. In proceeding for her forfeiture, the question of the validity of the seizure was raised by exceptions of the claimant, just as it was in this case. The Circuit Court of Appeals, Second Circuit, did not question that the point was well pleaded, but it proceeded to determine that the search and seizure of a domestic vessel was authorized.

The claimant in the above case petitioned this Court for a review and the petition was granted and is reported under the title of *Maul* v. *United States,* 274 U. S. 501, 531, this Court holding that the officers of the Coast Guard had authority to seize a domestic vessel upon the high seas beyond the twelve-mile limit, but implying that they had no authority to board and seize foreign vessels except as provided for in the Treaty between Great Britain and the United States.

The Abby, Fed. Cas. No. 14, was an information for forfeiture of a vessel for violation of the licensing laws. It was objected that the District Court of Massachusetts, where the information was brought, was without jurisdiction since the seizure was within the judicial district of Maine, and a statute provided that seizure within a district must be followed by forfeiture proceedings in the District Court of that district.

Justice Story found on the facts that the seizure was upon the high seas and that the District Court of Massachusetts had jurisdiction under another statute providing that in case of seizure upon the high seas forfeiture might be had in any district to which the vessel was brought. Having thus disposed of the question of the jurisdiction of the Court, the Justice also remarked that the point had been waived. But it does not appear that in that case the claimant had pleaded the point *in limine* in exceptions and answer, as was done here. The Justice held that the claimant was estopped to challenge the Court's jurisdiction because he had affirmatively recognized that jurisdiction by applying to the Court for, and receiving, bail of the vessel. Moreover, that was a clear case of a challenge to the jurisdiction of the Court, whereas, as has been indicated herein, the instant question would not appear to be a challenge to the jurisdiction of the Court.

It is true that in a case arising upon a libel for the forfeiture in admiralty the Circuit Court of Appeals, Fifth Circuit, said:

> "The objection to the authority of the Coast Guard to make the seizure is purely technical and without merit. After a ship is brought into the custody of the marshal through proper admiralty process, any irregularity in the initial seizure is immaterial and is waived by filing a claim or answer. *The Merino,* 9 Wheat. 391, 6 L. Ed. 118; *The Richmond,* 9 Cranch. 102, 3 L. Ed. 670; *In re Johnson,* 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103."

It is apparent from the cases cited that the Circuit Court of Appeals was merely applying to an American vessel in that case the rule of *The Richmond, supra,* that seizure of an American vessel by the United

States beyond the territorial waters of the United States raises no question, without more, going to the jurisdiction of the Court in which forfeiture proceedings based upon subsequent civil seizure are instituted. If, as seems unlikely, the above statement of the Circuit Court of Appeals is intended to mean that as a matter of admiralty practice objections to the validity of seizures may not be made in answers and exceptions, then the decision is not supported by the cases it cites (as has been seen) or by later cases.

To recapitulate:

There was clearly no express waiver in the Courts below of the precise point which it is now sought to have reviewed in this Court. The point was treated by both Courts below as having been properly put in issue, and was decided.

There is no case holding that the question of the validity of the seizure of a foreign ship, in view of the Treaty, may not be properly raised under the admiralty practice by answer and exceptions.

If considered as a question going to the jurisdiction of the Court, it is not a question of jurisdiction over the person for the proceeding is *in rem;* it must, therefore, be an objection to the jurisdiction of the Court over the subject-matter, and, therefore, may be raised at any time.

The question is not really of the jurisdiction of the Court, but of the authority of the administrative officers, and its determination, which turns upon the construction of the Treaty and application of the statutes, was within the jurisdiction of the Court and the question was properly put in issue in the answer and exceptions.

Assuming, but not admitting, that it would have been better pleading to challenge the validity of the seizure

by a separate special plea to the jurisdiction, the government is bound by the theory upon which the case was tried in the trial court and heard in the Circuit Court of Appeals, and is estopped to contend that the question presented to this Court was not properly in issue below. Petitioner's objection to the validity of the seizure raised by the answers and exceptions were not subjected to exception or objection by the government at trial; both parties introduced evidence upon the issue and the opinions of both trial court and Circuit Court of Appeals proceeded upon the theory that the controlling question was whether the seizure was lawful in view of the Treaty stipulations. The language of Mr. Justice Van Devanter, speaking for the Court in *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 96, 97, is strikingly in point:

> "The trial proceeded upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. *Effect must, therefore, be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.*"

This is a well-settled and generally accepted rule. See *Milton* v. *Pensacola Bank & Trust Co.*, 190 F. 126, 136 (C. C. A. 6th); *Brockenborough* v. *Champion Fibre Co.*, 176 F. 840, 842 (C. C. A. 4th); *Sutherland* v. *Sutherland*, 102 Ia. 535; *Tarbul* v. *Royal Exc. Shipping Co.*,

110 N. Y. 170; *Morrisson* v. *Atkinson*, 16 Okla. 571; *Knoop* v. *Kelsey*, 102 Mo. 291, 10 R. C. L. 701, sec. 281.

Respectfully submitted,

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APPENDIX

Statutory Basis for Review

The statute under which review is sought is Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 stat. 936, 938, 28 U. S. C. 347.

Reasons Relied Upon for the Allowance of the Writ

The Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts and District Courts on the application of Sections 581 and 584 of the Tariff Act of 1922 and 1930 and of the effect of the Treaty between the United States and Great Britain, which became effective May 22, 1924.

The Circuit Court of Appeals has decided an important question of International and Federal law which has not been, but should be decided and settled by this Court.

The Treaty with Great Britain modified, limited, abrogated and rescinded all inconsistent statutes and parts thereof (Sections 581 and 584 of the Tariff Act, particularly), regarding the search and seizure of

British vessels beyond the 3-mile limit except as provided for by the terms of the Treaty.

An examination of the debates in Congress at the time of the passage of Sections 581 and 584 of the Tariff Act of 1922 discloses that on July 6, 1922, Senator Sterling proposed the following amendment to this Section:

> "Officers of the Customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within six marine leagues of the coast of the United States, and hail, stop and board such vessel in the enforcement of the laws prohibiting, regulating, taxing or relating to the liquor traffic.
>
> The provision of the National Prohibition Act and other laws relating to intoxicating liquors shall be in full force and effect within six marine leagues of the Coast of the United States and shall be enforced by such officers who shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, Chapter 22, First Statutes at Large, page 668), upon Customs Officers in the enforcement of the Customs Laws."

On August 19, 1922, Senator Sterling filed the following amendment modifying the original amendment of July 6, 1922:

> "Officers of the customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within 4 marine leagues of the coast of the United States, and hail, stop, and board such

vessel in the enforcement of the laws prohibiting, regulating, taxing, or relating to the liquor traffic; and such officers shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, ch. 22, 1 Stat. L. 668) upon customs officers in the enforcement of the customs laws."

He carefully explained to Congress that he thought Congress had the right to extend the 3-mile limit, but at the risk of international complications which might subject us to claims for damages because of interference with vessels of other nations. He said further:

"Let me say to the Senator that I hope arrangements will be made with other nations covering that matter. I think the Secretary of State is in entire good faith endeavoring to make such an arrangement."

Mr. Sheppard (co-author of dry law):

"I trust the Secretary of State will be successful. It is a matter, however, which we cannot allow to rest until permanently and satisfactorily settled."

Mr. Sterling:

"I agree with the Senator from Texas." (See Cong. Rec., Vol. 62, Pt. 2, 67th Congress, 2nd Sess., p. 11593.)

It seems clear that the reason for the passage of this Section was to cover the period of the pending negotiations for a Treaty with Great Britain to allow seizure of British rum-smuggling ships.

Both Great Britain and the United States have strictly maintained that three miles from the coast marks the limit of territorial waters.

Prior to and subsequent to the passage of Sections 581 and 584 of the Tariff Act, the Government seized a number of British vessels under circumstances where the boats had never directly or by their small boats or crew come within the three-mile limit. The British Government vigorously protested these seizures. On June 26, 1922, Mr. Hughes, Secretary of State, proposed to Great Britain that a treaty be entered into giving to the authorities of each nation the right to search vessels of the other within twelve miles from the shore. This proposal was rejected.

On November 10, 1922, after the enactment of Section 581 of the Tariff Act of 1922, the Treasury Department ordered the release of all foreign vessels seized outside of the 3-mile limit where there was no evidence of communication with shore by means of the vessels' own boats.

This practice, so far as can be learned, continued in accordance with the above order until ratification of the Treaty with Great Britain on May 22, 1924.

Great Britain had never agreed to the provisions of Section 581 and firmly and rigidly insisted that three marine miles extending from the coast line outwards and measured from the low-water mark constitute the proper limits of territorial waters.

The Treaty of May 22, 1924, was expressly stated therein to have been for the purpose of "avoiding any difficulties which might arise" between the United States and Great Britain "in connection with laws in force in the United States on the subject of alcoholic beverages." There already had been difficulties as the result of seizures of British vessels. The United States

had seized vessels beyond the 3-mile limit which had neither themselves nor by their own boats come within territorial waters. Great Britain had resisted the exercise of any such jurisdiction over such vessels.

The Treaty defined the jurisdiction which the United States might exercise beyond the 3-mile limit. That the rights conferred were exclusive and strictly limited is shown not only by the language conferring them but by Article I of the Treaty. The pre-existing rules of international law as maintained by the two nations are to remain unchanged except as specifically provided for by the Treaty.

Sections 581 and 584 of the Tariff Act of 1922, reenacted in 1930, apply only where the seizure is strictly within the provisions of the Treaty. Only the specific jurisdiction mentioned in the Treaty was conferred upon the United States and all other was prohibited. *The Frances Louise,* 1 Fed. (2d) 1004.

In *The Sagatind,* 11 Fed. (2d) 673, the Circuit Court of Appeals (2nd Circuit) said:

> "We agree with *The Frances Louise,* 1 Fed. (2d) 1004, that these Treaties (with Great Britain and Norway) *exclusively* determine the status of vessels of appropriate nationality lying off the shore of the United States." (Italics ours.)

See also: *The Sagatind,* 4 Fed. (2d) 928, 930; *The Marjorie E. Bachman,* 4 Fed. (2d) 405, 408; *Henning* v. *United States,* 13 Fed. (2d) 74, 75 (C. C. A. 5th).

The Coast Guard officers were without authority to seize the "Mazel Tov" and that such seizure at the place made was a violation of the Treaty with Great Britain, which limited the jurisdiction of the United States over vessels of Great Britain except as specifically provided for by the Treaty, and the imposition

of any penalties in this case would be unlawful, in view of the circumstances of the seizure.

Assignment of Errors

1. The Circuit Court of Appeals erred in holding that the Treaty with Great Britain of May 22, 1924, relative to smuggling of intoxicating liquors did not limit search and seizure provisions of the Tariff Acts of 1922 and 1930 to British vessels within one hour's travel from the coast of the United States.

2. The Circuit Court of Appeals erred in holding that the facts specifically found by the District Court fulfill all the requirements for an adjudication of the forfeited liquors under Section 584.

3. The Circuit Court of Appeals erred in holding that all of the facts essential to the assessment of the penalty of $14,286.18 against the Master under Section 584 were found by the Court below and its collection out of the vessel under Section 594 could be lawfully imposed.

4. The Circuit Court of Appeals erred in holding that the Treaty of 1924 did not repeal, modify or abrogate the clause fixing the four league zone in all customs revenue laws, including Section 581 of the Tariff Act.

5. The Circuit Court of Appeals erred in its findings of law.

6. The Circuit Court of Appeals erred in vacating the decrees of the District Court.